

COURT OF APPEAL OF  
NEW BRUNSWICK

111/03/CA

IN THE MATTER OF an Application for  
an Amendment to Approval To Operate  
No. I-2606 issued under the Air  
Quality Regulation and the Water  
Quality Regulation, as amended by  
Amendment #1 dated August 24, 2001,  
Condition #32, as it applies to the  
importation of medical waste from the  
State of Maine by MSWM Ltd. (Mr.  
Shredding Waste Management Ltd.) for  
the purpose of incineration

- and -

IN THE MATTER OF an appeal from the  
Decision of the Minister dated  
September 9, 2002 refusing the  
Application for an Amendment,  
pursuant to section 42 of the Clean  
Air Act and section 3 of the Appeal  
Regulation - Clean Air Act

- and -

IN THE MATTER OF an Application for  
Judicial Review pursuant to Rule 69  
of the Rules of Court of the said  
Decision and of the Decision of the  
Minister dated November 8, 2002  
dismissing the appeal

B E T W E E N:

MR. SHREDDING WASTE MANAGEMENT LTD.,  
a duly incorporated company

(Applicant) APPELLANT

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF  
THE PROVINCE OF NEW BRUNSWICK, as  
represented by the Minister of  
Environment and Local Government

(Respondent)     RESPONDENT

Mr. Shredding Waste Management Ltd.  
v. Her Majesty the Queen in the right  
of the Province of New Brunswick, as  
represented by the Minister of  
Environment and Local Government,  
2004 NBCA 69

CORAM:

The Honourable Justice Rice  
The Honourable Justice Deschênes  
The Honourable Justice Robertson

Appeal from a decision of  
the Court of Queen's Bench:  
June 18, 2003

Appeal heard:  
November 13, 2003

Judgment rendered:  
September 16, 2004

Reasons for judgment by:  
The Honourable Justice Deschênes

Concurred in by:  
The Honourable Justice Rice  
The Honourable Justice Robertson

Counsel at hearing:

For the appellant:  
Sacha D. Morisset

For the respondent:  
Jean Eugène Trahan

THE COURT

The appeal is dismissed with costs in the amount of \$2,500.

The judgment of the Court was delivered by

DESCHÊNES, J.A.

I. Introduction

- [1] The respondent, the Minister of Environment and Local Government, refused to amend the license held by the appellant, Mr. Shredding Waste Management's (MSWM), issued under the *Clean Air Act*, S.N.B. 1997, c. C-5.2. (the "CAA"). The license allowed MSWM to operate a waste disposal facility. The amendment would have removed the condition which, in effect, required it to operate at emission levels of less than 80 pg/m<sup>3</sup> TED (80 picograms) with respect to the incineration of biomedical waste imported from the State of Maine, U.S.A. That requirement or condition had previously been imposed by the Minister pursuant to regulations adopted under the *Clean Environment Act*, R.S.N.B. 1973, c. C-6, as Condition #5 attached to the Minister's Certificate of Determination.
- [2] By judicial review under Rule 69 of the *Rules of Court*, MSWM challenged the Minister's refusal to amend the license. Following the Minister's refusal to allow an appeal, MSWM applied for judicial review of those decisions under Rule 69 of the *Rules of Court*. The reviewing judge dismissed the application. This is an appeal from his decision which is reported at (2003), 264 N.B.R. (2d) 323 (Q.B.).
- [3] For the reasons that follow, I find that the reviewing judge was correct in dismissing MSWM's application. In my view, the Minister's decisions refusing: (a) to amend the license to operate, and (b) in dismissing MSWM's appeal of such refusal, whether scrutinized on the basis of abuse of discretion or for patent unreasonableness, withstand judicial review.

## II. The Background

- [4] MSWM has been allowed to operate a medical waste incineration facility in Moncton, New Brunswick since 1995 with respect to waste generated in this Province.
- [5] In 1999, the Minister allowed MSWM to import biomedical waste from the Atlantic Provinces and Quebec. MSWM is allowed, for the time being, to burn the waste using a less exacting standard than the 80 picograms emission level. The more exacting emission standard will be discussed throughout this decision.
- [6] In 2000, MSWM applied for permission to import biomedical waste from the State of Maine. In November 2000, the Minister issued a Certificate of Determination (or a Determination Order), pursuant to the *CEA* and its Regulations, subject to Condition #5. That condition requires MSWM to install appropriate pollution control equipment to ensure that emissions from its facility comply with emission standards for biomedical waste of 80 picograms or less. That emission level is in compliance with the proposed standards of the Canada Wide Standards (CWS) for dioxin and furan control. Dioxins and furans are highly dangerous contaminants produced by biomedical waste incineration. They are slated for virtual elimination by all stakeholders.
- [7] At that point in time (at least in the Fall of 2000), the Provincial Environment Ministers considered the 80 picograms standard proposed in the CWS as an appropriate standard for biomedical waste emissions. The CWS proposal, with respect to emission standards for biomedical waste, was to be applied to new or expanding facilities. Existing facilities were given until 2006 to meet the more exacting standard. The technology for retrofitting existing facilities to meet the more exacting standard, although available, was in the early stages of development and was expensive to install. It is to be noted here that throughout all these discussions designed to achieve national

uniformity on emission standards, all stakeholders recognized that the decisions to implement the emission standard and the timing of their implementation was to remain with the Provinces' respective governments and legislatures.

[8] MSWM clearly understood the import of Condition #5 and, in fact, set out to install new emission control equipment in an attempt to comply with the required standard when it was imposed in 2000 under Condition #5. The Minister's decision to impose Condition #5 was never challenged by way of judicial review.

[9] It soon became apparent, as the reviewing judge put it at para. 15, that MSWM "would not be able to meet this standard without some considerable retrofit of its facility which would involve great expense."

[10] MSWM requested the variation or amendment to Condition #5, so that the 80 picogram standard would be delayed until 2006 on the ground that it was an "existing facility" as defined by the proposedh CWS. In addition, MSWM argued that because a less stringent standard was applied with respect to the burning of biomedical waste from New Brunswick, the Atlantic Provinces and Quebec, the requirement of a more stringent standard for waste from Maine was discriminatory, and not justified from a scientific point of view or otherwise. The Minister was not prepared to vary Condition #5 as requested by MSWM.

[11] On August 24, 2001, after informing MSWM that Condition #5 would not be amended, the Minister proceeded to amend the Approval to Operate issued to MSWM under the *CAA* by adding Condition #32. Condition #32 required MSWM to conduct stack tests to the satisfaction of the Department of the Environment before MSWM could import biomedical waste from Maine. The amendment, as stated by the reviewing judge in para. 18 of his decision, was "intended to put the Applicant's [MSWM's] operation authority on all fours" with Condition #5 imposed by the Minister in November 2000 under the *Clean Environment Act* regulations.

- [12] MSWM again upgraded its equipment in an attempt to reach the required standard of 80 picograms, but to no avail.
- [13] In June 2002, MSWM sought an amendment to Condition #32 (and by implication Condition #5, as Condition #32 was intended to be congruent in all respects to Condition #5) on the same grounds as previously mentioned.
- [14] On September 9, 2002, the Minister refused to amend Condition #32. Pursuant to s. 42 of the *CAA*, MSWM appealed the Minister's refusal to amend Condition #32. MSWM's submission to the Minister contained the essential arguments made in its application to amend. The submission on appeal was that the impugned policy was discriminatory, unfair, not required by, and in fact contrary to, the CWS for existing facilities and that the Minister's own implementation plans did not allow her to impose the CWS. On November 8, 2002, the Minister dismissed the appeal.
- [15] As will be seen later, the Minister's decision to impose Condition #5, her amendment of MSWM's license to operate by the addition of Condition #32, her subsequent refusal to amend Condition #32, as well as the Minister's dismissal of the appeal from such refusal, were all decisions based on the government's policy of requiring a more stringent emission standard for biomedical waste imported from another country. The government, through the decision of the Minister, decided to adopt such a policy to cover existing facilities such as MSWM, despite the fact that MSWM was allowed to continue to use a less stringent standard to burn biomedical waste from Canada.
- [16] The Minister's decisions of September 9 (the refusal to amend Condition #32) and November 8, 2002 (the dismissal of the appeal of the refusal to amend Condition #32) were challenged on judicial review by Notice of Application dated February 8, 2003. It is the reviewing judge's refusal to interfere with those decisions that forms the subject matter of this appeal.

A. *The Legislative Context*

- [17] MSWM's facility is designed to incinerate biomedical waste, an activity that may have a significant environmental impact. In this Province, the conditions under which such facilities can operate, are regulated by the *CEA*, *CAA* and their regulations. The Minister administers both Acts, and has been entrusted by the Legislature to implement its policies. For greater clarity, the relevant provisions of both Acts and Regulations, as referred to in this decision, are annexed as document "A".
- [18] Regulation 87-83 – *Environment Impact Assessment Regulation* – *Clean Environment Act* (the EIA regulation) and Regulation 84-179 – *Appeal Regulation* (the Appeal regulation) were adopted pursuant to the authority of the *CEA*.
- [19] Regulation 97-133 – *Air Quality Regulation* – *Clean Air Act* was adopted pursuant to the authority of the *CAA*.
- [20] The provisions of both environmental Acts and their regulations clearly reveal their object and purpose.
- [21] Section 2 of the *CAA*, for example, provides that the purpose of the *Act* and its regulations "is to support and promote the protection, restoration, enhancement and wise use of the environment in keeping" with several enumerated principles. The first principle requires "controlling the release of contaminants... the protection of human health and the general well-being of society". Another stated purpose and objective requires that "the use of resources and the environment should not compromise the health or the economic or social well-being of future generations". Clause (j) provides that the Government "should consider the principles set out in this section [s. 2] in the

development and implementation of all of its regulations, policies, programs and practices”.

- [22] The concept of the “environment”, which the Minister is entrusted to protect for the betterment and general well-being of residents of New Brunswick and society in general, is very broad as it means air, water, soil, plant and animal life, including human life and the social, economic, cultural and aesthetic conditions that influence the life of humans or of a community. (See definition of “environment” in ss. 1 and 31.1 of the *CEA*).
- [23] The Minister is the statutory delegate who makes most of the important decisions under both Acts and their regulations in order to protect the environment from the harmful effects of contaminants.
- [24] The approval to operate a facility to incinerate biomedical waste, for example, is regulated by subsection 5(3) of the *Air Quality Regulation* adopted pursuant to the authority of the *CAA*. It provides that “...the Minister may, in the Minister’s discretion, issue an approval for the source [facility], subject to such terms and conditions as the Minister may consider appropriate” or the Minister may, in her or his discretion “deliver to the applicant a written notice of refusal of the application, with reasons.” Again, under s. 15(1) of the *CAA*, “the Minister may, in the Minister’s discretion, issue, amend, transfer, suspend, cancel, renew and reinstate registrations, permits and approvals in accordance with the regulations.” [Underlining is mine.]
- [25] The amendment to MSWM’s license to operate, by the imposition of Condition #32 upon it, was made pursuant to the authority granted to the Minister under s. 15 of the *CAA*. The impugned decision in this case, specifically the decision to refuse to amend the license to operate by amending Condition #32 of the approval to operate, as requested by MSWM, is also regulated by s. 15 of the *CAA* and, likewise, was discretionary.

- [26] Anyone who proposes to operate an undertaking covered by the *CEA* must register its facility pursuant to the *CAA* and must obtain the Minister's approval to operate. The approval to operate is issued only once, but can be amended. (s. 3 and subsection 5(3) of the *Air Quality Regulation*).
- [27] Although terms and conditions can be imposed on a facility's license to operate, the license to operate should not be confused with the Certificate of Determination. The latter is issued by the Minister, with or without terms and conditions, (the *EIA* certificate) to approve a specific activity (i.e. the burning of waste from Quebec) under s. 6 of the *EIA* regulations. Thus, the Minister may, in her discretion, impose terms and conditions either upon the issuance of the license to operate under the *CAA* and its regulations, or upon the issuance of a Certificate of Determination issued under the *CEA* and its regulations.
- [28] A person operating a facility may have more than one Certificate of Determination pursuant to the *EIA* regulation, since every undertaking must be registered before the proponent undertakes it. It is common ground here that MSWM has four Certificates of Determination allowing it to burn biomedical waste: one for burning waste from this Province, one for burning waste from Quebec, one for burning waste from the Atlantic provinces and one granted for the importation and burning of biomedical waste from Maine. Only the latter Certificate of Determination relating to biomedical waste from Maine contains Condition #5 imposing the 80 picograms emission standard.
- [29] Both parties acknowledge that under the statutory scheme envisaged by the *CAA*, the *CEA*, and their regulations, the conditions contemplated by Condition #5 and its counterpart Condition #32, could be imposed under both Acts.
- [30] It is also common ground that the holder of an approval to operate can apply for an amendment to the approval. (Subsection 9(4) of the *Air Quality Regulation* adopted under the *CAA*). If the application for an amendment is refused by the Minister,

the holder of the license to operate has a right to appeal a refusal pursuant to s. 42 of the *CAA* which provides that “a person ... whose application for an amendment of an approval [to operate] has been refused may appeal the refusal in accordance with the regulations.” (See s. 3 of Regulation 97-131 – *Appeal Regulation Appeal – Clean Air Act*, which adopts the Appeal Regulation 84-179 under the *CEA*.)

- [31] MSWM’s appeal of the Minister’s refusal to amend the license to operate is to the same Minister. For appeal purposes, the appellant is entitled to file a written submission and supporting documentation. Section 4(2) of Appeal Regulation directs the Minister to review the decision appealed from and “make a written determination of the matter, with reasons, confirming, varying or revoking the order or decision.”

B. *The decision appealed from and the Grounds of Appeal*

(1) The Judgment Below

- [32] It is abundantly clear in his reasons for dismissing MSWM’s application, that the reviewing judge applied the “pragmatic and functional approach” to determine the appropriate standard of review, which he found to be “patent unreasonableness”. He then set out to deal with the specific grounds upon which MSWM challenged the Minister’s decisions. Before doing so, he wrote at paras. 30-33:

The law recognizes that Courts must give great deference to Ministerial discretion exercised under statutory authority. That principle was recognized by Madame [sic] Justice L’Heureux-Dubé in Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 and by Mr. Justice Binnie in Canadian Union of Public Employees v. Ontario (Minister of Labour), [2003] S.C.J. No. 28.

Absent a clear case of procedural impropriety, irrationality or illegal action, courts cannot take on the business of reviewing Ministerial discretion as a matter of course. The merits or wisdom of a decision made is not a matter of review. It must be shown that a ministerial discretion has been exercised that is clearly beyond the jurisdiction of the

minister to act as she did such that natural justice demands judicial intervention.

In applying the pragmatic and functional approach and the guidelines set out by the Supreme Court of Canada in Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] S.C.J. No. 18, I conclude that the exercise of the discretion given by the legislature of New Brunswick to the Minister in the circumstances of this case is entitled to the highest deference as the exercise of such discretion is concerned with the protection of the public, engages policy issues, and involves the balancing of multiple sets of interests or considerations.

To grant the Applicant's request that this Court move to quash the decisions in question made by the Minister, I must be satisfied that the Minister lost jurisdiction by proceeding unfairly in disregard of principles of natural justice or that she acted outside her legislative mandate or that she acted in a patently unreasonable manner in the exercise of the discretion given her.

[33] The reviewing judge concluded his reasons for judgment by writing at para. 35:

Having reviewed the grounds advanced by the Applicant and the authorities presented on this Application, I am not satisfied that the Minister has been shown to have acted arbitrarily or in a manner procedurally unfair. Nor am I satisfied that she acted illegally in the sense of exercising a discretion outside her legislative authority. Nor am I satisfied that it has been shown that she lost jurisdiction by exercising her authority in a patently unreasonable manner or for that matter in a manner that should be seen as unreasonable simpliciter had that test been found appropriate.

[34] MSWM challenged the Minister's decisions on several grounds. The reviewing judge responded to all at para. 34:

I turn to the specific grounds advanced by the Applicant.

(a) The Applicant contends that the Minister had no jurisdiction to apply the C.W.S. to her original Determination under the Clean Environment Act made October 2, 2000 because the C.W.S. did not become effective in New Brunswick until June of 2001.

I see the Minister with the jurisdiction to apply any standard reasonable to the circumstances. The 80 picogram standard was under active consideration as an appropriate standard for emissions resulting from incineration of biomedical waste. I see no reason why the Minister was precluded from applying it with respect to importation of biomedical waste from another country for incineration.

(b) The Applicant contends that the Minister had no jurisdiction to apply the C.W.S. to stack test results under the Amendment to the Applicant's Approval to Operate on August 24, 2001 because New Brunswick had not established an implementation plan for C.W.S. at that time. Again, I fail to see what the implementation plans for the C.W.S. in New Brunswick has to do with the jurisdiction of the Minister to impose an 80 picogram standard for burning biomedical waste imported from Maine.

(c) The Applicant contends that the Minister lost jurisdiction by requiring the Applicant to show emissions better than 80 picograms if it is to burn biomedical waste from Maine, when under the Department's implementation plan now approved the Applicant does not have to meet the 80 picogram standard until 2005 in order to maintain its approval to operate. Again I fail to see how this goes to the policy decision taken by the Minister to impose a more stringent standard with respect to biomedical waste imported into New Brunswick from outside Canada.

(d) The Applicant contends that the Minister lost jurisdiction by applying the 80 picogram standard to imports from Maine when under the C.W.S. the Applicant as an operator of an existing facility does not have to meet this level until 2006. Again, I find no legislative requirement that the Minister apply the C.W.S. to imports of biomedical waste from Maine.

(e) The Applicant contends that the Minister lost jurisdiction by failing to exercise her discretion in

accordance with principles and objectives of the Clean Air Act and of the Canada Wide Standards adopted by all Canadian Ministers of Environment. Section 2 of the Act provides that the purpose of the legislation empowering the Minister is to support and promote the protection, restoration, enhancement and wise use of the environment. Section 5(3) of the Regulations promulgated pursuant to the Act provides that the matter of issuing and amending permits in accordance with the regulations is in the Minister's discretion and that she may in her discretion impose such terms and conditions as she considers appropriate.

In this case she has determined that an emission standard of 80 picograms is appropriate if biomedical waste imported from Maine is to be incinerated in New Brunswick. I fail to see how it has been shown that this exercise of the Minister's discretion is outside the principles and objectives of the Clean Air Act. The evidence is that there is considerable flexibility as to the imposition of the C.W.S. in each Province. I see no legislative mandate nor matter of policy under the C.W.S. that precludes the Minister from imposing a more stringent standard for emissions with respect to biomedical waste imported from Maine.

(f) The Applicant contends that the Minister acted on wrong principles/or irrelevant considerations in requiring the Applicant to meet now the 2006 target of C.W.S. for existing facilities or alternatively acted arbitrarily in imposing the 2006 C.W.S. upon the Applicant now without valid reason for doing so. The argument goes that scientific considerations would go to permit burning biomedical waste in an existing plant at a standard lower than 80 picograms until year 2006. I fail to see how that argument precludes the Minister from imposing a higher standard to situations where such waste is imported from another country. The social and political dynamic is quite different in such a situation and it seems quite within the purview of the Minister's discretion to consider this in exercising her discretion in matters pertaining to her legislative responsibility to support and promote the protection, restoration, enhancement and use of the environment. It is not the Court's role to say whether she should, or should not, impose a higher standard in such a circumstance. At the same time the exercise of ministerial discretion one way or the other does not amount to a

decision that can be seen as patently unreasonable or arbitrary by way of an abuse of process.

(g) The Applicant contends that the Minister acted unlawfully by applying different principles to the Applicant as opposed to two other smaller facilities in New Brunswick that have the capacity to incinerate biomedical waste. The evidence is clear that the Applicant has the only facility concerning which application has been made to incinerate biomedical waste from outside Canada. There is no basis for alleging discrimination against the Applicant in this regard.

(h) The Applicant contends that the Minister lost jurisdiction by exercising her discretion unfairly, capriciously and/or in an unreasonable manner in requiring the Applicant to comply with standards for an existing facility that the Canadian Council of Environment Ministers has decided should not be applied to existing facilities until 2006. The evidence before me does not support this contention. There is nothing in the suggested C.W.S. adopted by the Environmental Minister that says that the 80 picogram standard should not be applied now with respect to biomedical waste to be imported from another country to be burned in an existing Canadian facility. There is no legal basis to say that the Minister's discretion was fettered by the C.W.S. in any event. Further, on balance the evidence is that the 80 picogram standard imposed is attainable now, albeit with difficulty and probably involving substantial retrofit and considerable expense.

Lastly the Applicant contends that the Minister lost jurisdiction on grounds of procedural fairness because she refused to grant the Applicant's request to amend Condition #12 [#32] in its Amended Approval to Operate, or the Applicant's appeal from that decision, without giving reasons. It is apparent that the reason for the Minister's action in this regard was that she felt the 80 picogram standard imposed appropriate in the circumstances and within her discretion to impose.

(2) The Grounds of Appeal

[35]

MSWM appeals upon the grounds that the application judge:

- (a) [E]rred in law in failing to accept all of the affidavit evidence offered by the Appellant [MSWM] in reply to the affidavit evidence filed by the Respondent [the Minister]...;
- (b) [E]rred in law and in fact in failing to properly interpret the affidavit evidence before him and made material findings contrary to the weight of that evidence and/or on no evidence at all;
- (c) [E]rred in law in attributing to the Respondent a legislative mandate broader than the Respondent has; and
- (d) [W]rongly applied the pragmatic and functional approach and erred in law and in fact in declining to find that the Respondent acted on wrong principles and irrelevant considerations, arbitrarily, unfairly, capriciously, and in an unreasonable manner.

### III. Analysis

[36] In its Notice of Application for judicial review, MSWM emphasized the distinction in the CWS between new or expanding facilities, and existing facilities, and the 2006 timeframe to impose the 80 picograms standard on existing facilities such as MSWM. It pointed out that it had applied for an amendment to allow it to burn waste imported from Maine using the same standards used for burning waste originating within Canada until 2006, and that the Minister had refused without providing adequate reasons.

[37] In support of its position, MSWM filed the affidavits of Jean-Guy Richard, Clayton Barclay and Lizon Chiasson-Foulem. The main theme developed in these affidavits was that MSWM was an existing facility, and that since the CWS, along with its timeframe of 2006, applied to existing facilities, the Minister had no authority to impose such stringent conditions upon it. MSWM indicated that it was challenging the Minister's decision to insist upon the 80 picograms standard as arbitrary, discriminatory, capricious and irrational. MSWM pointed out that the decision was irreconcilable with a

departmental implementation plan adopted, but ignored, by the Minister. It also contended that the imposed standards were unreasonable because they were practically impossible to meet, and not required of other facilities in the Province. In large measure, those were the same arguments that MSWM put to the Minister in support of its unsuccessful attempt to have the Minister amend Condition #32 and in its submissions on appeal to the Minister.

[38] In response, the Minister filed the affidavit of Marc Glynn, an air quality engineer for the Department of the Environment, who was involved in the approval process. In his affidavit, Mr. Glynn refers to all the documents before the Minister at the appeal level. Mr. Glynn sheds light on the process which brought about the CWS, and how it impacted on the allegations made in the affidavits filed by MSWM. In particular, he explained that the CWS were adopted by the Canadian Ministers of Environment in 1998, but that the implementation of these emission standards was left to each province. As a result, each province retained the discretion to impose the early implementation of compliance dates, and adopt more stringent standards than those suggested by the accords. He dispelled any notion that the imposed standards were unreasonable because they were unattainable, or that they were not in accord with his Department's implementation plan pertaining to emission standards. He also made it clear that MSWM was fully aware from the beginning that government policy would not allow the importation and incineration of biomedical waste from another country, unless the 80 picograms emission standard was met. In addition, the Environment Department made it very clear that the government policy was imposed because MSWM, the largest facility in the Province to burn biomedical waste, was the first and only facility in this Province ever allowed to import biomedical waste for incineration from outside Canada and that the imposed stringent standards were appropriate under such circumstances.

[39] In reply, MSWM filed an affidavit from Henry Hadley, and a second one from Mr. Richard. In essence, these affidavits took issue with the Minister's contention that the stringent standards could reasonably be met. According to MSWM, the technology for existing facilities was not readily available as alleged by the Minister and,

in any event, its installation was not economically viable. Furthermore, it was alleged that other jurisdictions in North America did not require such exacting standards and they were not necessary to protect residents from the acknowledged harmful effects of contaminants such as dioxin and furan. The affidavits, in effect, take issue with the merits or correctness of the Minister's decision.

[40] At this point, it is important to emphasize that under Rule 69.03 of the *Rules of Court*, an application for judicial review of a decision must be commenced within three months from the date of the decision. Thus, the Minister's decision to impose Condition #5 on the Certificate of Determination, issued to MSWM in November 2000, could not be attacked by MSWM's application for judicial review commenced in February 2003, more than two years later. The Minister's decision in August 2001 to amend MSWM's license to operate by adding Condition #32 to make it consistent with Condition #5 is also insulated from attack by way of judicial review because of the same Rule. As a result, the decision of the Minister refusing to amend Condition #32, and the Minister's decision dismissing MSWM's appeal of the Minister's refusal to amend, are the only decisions that could be challenged under Rule 69. On that basis, the Minister argued that MSWM was not entitled to challenge the correctness or merits of the decision to impose the 80 picograms standard for the burning of imported waste from another country, because that decision was made, at the latest, in November 2000. The Minister contended that the focus of the judicial review should be restricted to the Minister's reasons for refusing to amend and the Minister's dismissal of the appeal.

[41] From that perspective, MSWM's attack had to be restricted to the reasoning behind the refusal to amend and the subsequent dismissal of the appeal. In this case, the Minister's decisions to refuse to amend Condition #32, attached to MSWM's license to operate, was made on the basis that the amendment, as requested by MSWM, could not be made unless Condition #5, attached to the MSWM's Certificate of Determination, was also amended. As Condition #5 reflected government policy still in effect, the Minister was simply not prepared to amend Condition #32. In that narrow perspective, the Minister's decisions to refuse to amend and her dismissal of MSWM's

appeal from that refusal, were obviously logical and certainly not patently unreasonable. The Minister's contention was that the inquiry of the application judge was limited to answering those questions, a position that was rejected in para. 25 of his reasons for judgment, where he stated:

The Minister is quick to point out that her initial Determination made under the Clean Environment Act on October 2, 2000 which by Condition #5 required the Applicant to comply with an 80 picogram standard before biomedical waste could be imported from Maine by the Applicant is not under review on the Application before me. That is correct, however if the Minister's subsequent action to amend [to refuse to amend] the Amended Approval to Operate to include Condition #12 [#32] were to be quashed, then it would seem the Minister would be hard pressed not to review her initial Determination. For that reason I do not consider the Application presently before me as moot and have heard argument accordingly.

[42] With this background, I propose to address the issue of the applicable standard of review and the use of affidavit evidence in this case. All grounds of appeal will be dealt with, although not in the order in which they were raised.

A. *The Standard of Review - Grounds (c) and (d)*

[43] Apart from the issues relating to the affidavit evidence, the grounds of appeal allege errors of law in the reviewing judge's use of the pragmatic and functional approach to deal with the discretionary decisions of the Minister and in declining to find that the Minister acted upon wrong principles and irrelevant considerations, arbitrarily, unfairly, and capriciously. As such, these grounds of appeal raise two issues, namely: the appropriate standard of review to apply in this case and how to relate the appropriate standard of review to such nominate defects as bad faith, arbitrariness, consideration of irrelevant factors or failure to consider relevant factors.

[44] In my respectful view, the Supreme Court of Canada has addressed most of the questions that must be answered in this case in *Suresh v. Canada (Minister of*

*Citizenship and Immigration*), [2002] 1 S.C.R. 3 where the appropriate standard of review of the exercise of administrative discretion was dealt with. That case involved allegations that the federal Minister had acted in bad faith, arbitrarily or without sufficient evidence, without considering relevant factors or by considering irrelevant ones.

[45] I find it convenient for our purposes to reproduce the following paragraphs of *Suresh*, not only because they are helpful in determining the applicable standard of review in this case, but also because the Court makes it abundantly clear that the pragmatic and functional approach should be applied to discretionary ministerial decisions, a view that had been espoused a few years earlier in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. As the Court stated at paras. 29-31 and 34-37 of *Suresh*:

The first question is what standard should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada. We agree with Robertson J.A. that the reviewing court should adopt a deferential approach to this question and should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.

This conclusion is mandated by *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, which reviewed the principles for determining the standard of review according to the functional and pragmatic approach. In *Pushpanathan*, the Court emphasized that the ultimate question is always what the legislature intended. One looks to the language of the statute as well as a number of factors to determine that intention. Here the language of the Act (the Minister must be "of the opinion" that the person constitutes a danger to the security of Canada) suggests a standard of deference. So, on the whole, do the factors to be considered: (1) the presence or absence of a clause negating the right of appeal; (2) the relative expertise of the decision-maker; (3) the purpose of the provision and the legislation generally;

and (4) the nature of the question (*Pushpanathan, supra*, at paras. 29-38).

The first factor suggests that Parliament intended only a limited right of appeal. Although the Minister's s. 53(1)(b) opinion is not protected by a privative clause, it may only be appealed by leave of the Federal Court, Trial Division (s. 82.1(1)), and that leave decision may not itself be appealed (s. 82.2). The second factor, the relative expertise of the decision-maker, again favours deference. As stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, "[t]he fact that the formal decision-maker is the Minister is a factor militating in favour of deference" (para. 59). The Minister, as noted by Lord Hoffmann in *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 (H.L.), at para. 62, "has access to special information and expertise in ... matters [of national security]". The third factor – the purpose of the legislation – again favours deference. This purpose, as discussed in *Pushpanathan, supra*, at para. 73, is to permit a "humanitarian balance" of various interests – "the seriousness of the danger posed to Canadian society" on the one hand, and "the danger of persecution upon *refoulement*" on the other. Again, the Minister is in a superior position to a court in making this assessment. Finally, the nature of the case points to deference. The inquiry is highly fact-based and contextual. As in *Baker, supra*, at para. 61, the s. 53(1)(b) danger opinion "involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules", suggesting it merits a wide degree of deference.

...

It follows that the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion (see, for instance, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 607, where Iacobucci J. explained that a reviewing court should not disturb a decision based on a "broad discretion" unless the tribunal has "made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner").

The Court's recent decision in *Baker, supra*, did not depart from this view. Rather, it confirmed that the pragmatic and

functional approach should be applied to all types of administrative decisions in recognition of the fact that a uniform approach to the determination of the proper standard of review is preferable, and that there may be special situations where even traditionally discretionary decisions will best be reviewed according to a standard other than the deferential standard which was universally applied in the past to ministerial decisions (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403).

The Court specified in *Baker, supra*, that a nuanced approach to determining the appropriate standard of review was necessary given the difficulty in rigidly classifying discretionary and non-discretionary decisions (paras. 54-55). The Court also made it clear in *Baker* that its approach "should not be seen as reducing the level of deference given to decisions of a highly discretionary nature" (para. 56) and, moreover, that any ministerial obligation to consider certain factors "gives the applicant no right to a particular outcome or to the application of a particular legal test" (para. 74). To the extent this Court reviewed the Minister's discretion in that case, its decision was based on the ministerial delegate's failure to comply with self-imposed ministerial guidelines, as reflected in the objectives of the Act, international treaty obligations and, most importantly, a set of published instructions to immigration officers.

The passages in *Baker* referring to the "weight" of particular factors (see paras. 68 and 73-75) must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors: see *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.); *Re Sheehan and Criminal Injuries Compensation Board* (1974), 52 D.L.R. (3d) 728 (Ont. C.A.); *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; *Dagg, supra*, at paras. 111-12, *per* La Forest J. (dissenting on other grounds).

[46] The application of the pragmatic and functional approach requires a consideration of numerous factors which must be weighed together in order to apply the appropriate standard of review. In this case, a consideration of such factors leads me to conclude that the standard of review is that of patent unreasonableness. (See oral decision of Robertson J.A. on behalf of the Court in *1359629 Ontario Inc. v. Province of New Brunswick (Minister of Environment and Local Government*, [2004] A.N.-B. no 199, (QL)) reaching the same result).

(1) The language of the *Act* and the specific provisions

[47] The language of the *Immigration Act* at issue in *Suresh*, allowed the Minister to decide the relevant matter if the Minister “was of the opinion” that a person was a danger to the security of Canada. The Court referred to such power as the “Minister’s discretionary decision” and said such language suggested a standard of deference. In the case before us, the language of the Acts and Regulations make it abundantly clear that the Minister’s decision pertaining to the amendment of MSWM’s license to operate by imposing Condition #32, could be made if the Minister, in her discretion, thought it was appropriate to do so. The same can be said of the Minister’s refusal to amend and the Minister’s dismissal of the appeal. The impugned decisions in this case are specifically identified by the legislator as discretionary decisions. When those specific provisions are considered in the context of the Acts (CAA and CEA) as a whole, there is no doubt that they suggest a high level of deference.

(2) The absence of a privative clause and right of appeal to the courts

[48] There is no privative clause protecting the Minister’s decisions, and this would favor no deference. However, the absence of a privative clause must be considered in light of the other factors. In particular, the absence of an express right of appeal to the courts from the Minister’s discretionary decisions must also be considered. The consideration of these factors cannot lead one to imply a high standard of scrutiny.

I would consider the absence of a privative clause as neutral in nature in terms of trying to decipher the legislator's intent on the issue of deference.

(3) The relative expertise of the decision-maker

[49] As in *Suresh* and *Baker*, the fact that the formal decision-maker is the Minister militates in favor of deference. There is no question that, in this Province, the Minister has been designated by the Legislature to have responsibility for the assessment of facilities that could have a negative impact on the environment. The Minister is supported by experts and advisors on environment issues and has been specifically entrusted by the Legislature to make decisions to protect citizens against the harmful effects of contaminants. The relevant provisions of the *CAA* and the *CEA* authorize the Minister to do what the Minister considers to be appropriate to manage and protect the environment with the help and advice of specialized personnel. In making the important decisions pertaining to the granting of a license to operate an undertaking such as MSWM, including the type of conditions and terms under which it should operate, the Minister is confronted with competing technical and policy considerations. As the reviewing judge aptly put it at para. 32, the decision-making process "...involves the balancing of multiple sets of interests or considerations." There is no question that the Minister brings a considerable degree of expertise to bear on her or his decision and that such expertise was engaged in this case. Compared to the Minister's special expertise regarding environmental issues, along with the type of socio-economic considerations that form part of the decision-making process, the courts are at a disadvantage. This militates in favor of more deference.

(4) The purpose of the legislation and the nature of the problem

[50] The purposes of the *CAA* and the *CEA* and their regulations have already been discussed. In my view, the reviewing judge was correct when, relying on *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para 31, he concluded at para. 32 of his reasons for judgment that: "...the exercise of the discretion given by the legislature of New Brunswick to the Minister in the circumstances of this case is entitled to the highest deference as the exercise of such discretion is

concerned with the protection of the public, engages policy issues, and involves the balancing of multiple sets of interests or considerations.” The Court also stated in *Dr. Q* at para. 30 that “...increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies.” In my view, the decision of the Minister to initially impose Condition #5 and then to amend MSWM’s license to operate by adding Condition #32 to conform with Condition #5, as well as her subsequent decisions to refuse to amend Condition# 32 and her decision to dismiss an appeal from the refusal to amend were all decisions made in compliance with a policy decision made by the Minister. The policy decision clearly involved the balancing of multiple sets of interests or considerations. In reaching her decision, the Minister would be required to weigh numerous factors. No doubt, a consideration of the purpose of the legislation favors deference because the statutory delegate is in a better position to make decisions directed toward the attainment of the purposes of the legislation than a court.

- [51] A consideration of the nature of the problem also suggests deference. Here, the problem revolves around the Minister’s adoption of a policy that requires a more exacting emission standard with respect to the incineration of biomedical waste from another country. The higher standard requires the installation of more sophisticated and expensive technology and this, in turn, could have the effect of forestalling economic development in the province. On the other hand, the Minister has an overarching responsibility to adopt policies that protect the environment. She is answerable to the Legislature and the electorate with respect to such policies. In this case, the Minister adopted the policy under discussion based upon numerous factors, including socio-economic considerations. The decision making process does not involve the strict application of legal rules or the interpretation of the law. In that context, the Minister is not only the statutory delegate with the broad discretion to adopt such policies, he or she is undoubtedly in a better position than the courts to make those kinds of decisions. As mentioned, this factor also favors deference.

[52] In my opinion, the reviewing judge did not err in law when he applied the patently unreasonable standard in the context of the allegations made by MSWM. He proceeded to appropriately scrutinize the decisions of the Minister as suggested in *Suresh*, namely, by proceeding to review the decisions for patent unreasonableness not only on the basis of whether it was clearly irrational or illogical, but whether such decisions were patently unreasonable on the basis of nominate defects such as bad faith, lack of evidence, arbitrariness, failure to consider relevant factors or by a consideration of irrelevant factors.

[53] In essence, the reviewing judge concluded that the legislative scheme created under the *CAA*, the *CEA* and their regulations entrusted the Minister with the authority and broad discretionary powers to adopt policies with respect to the incineration of biomedical waste from another country. He found that the Minister had not acted arbitrarily, capriciously or without jurisdiction, because the legislation regulating the Minister's powers clearly allowed the adoption of the policy in question. He further found that the policy was not contrary to any implementation plan previously adopted by the Minister dealing with biomedical waste imported from another country and that the CWS were guidelines to be adopted by the provinces in accordance with their own legislative agendas.

[54] No doubt, the Minister proceeded to weigh numerous factors before she decided to impose the 80 picograms emission standard on imported waste from another country. However, as pointed out in *Suresh* at para. 37: "...it is the Minister who was obliged to give proper weight to the relevant factors and none other." The Court added that, "Baker does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process..." The reviewing judge, at para. 34(f), stated that: "...it is not the Court's role to say whether she should, or should not, impose a higher standard in such a circumstance." Put another way, there were no constraints, whether implied by law or self imposed by the Minister, which could act as an impediment to the adoption of the impugned policy decision. Nor was there any evidence that the Minister had acted for improper purposes, unfairly or arbitrarily, or that the

decisions to refuse to amend and the subsequent dismissal of MSWM's appeal had been made by taking into account irrelevant considerations or by failing to take relevant considerations into account.

[55] For these reasons, there is no merit to grounds of appeal (c) and (d) cited in para. 35.

[56] Grounds of appeal (a) and (b), dealing with affidavit evidence, are also without merit.

[57] The grounds upon which the Minister's decisions were being challenged in the Notice of Application and the general contents of the affidavits filed in support thereof, have already been alluded to and need not be repeated. Suffice it to say that the affidavit filed on behalf of the Minister was a direct response to the allegations made in MSWM's Notice of Application and the affidavits filed in support of its application.

[58] Rule 69 envisages the use of affidavit evidence in support of applications for judicial review. (See Rules 69.02, 69.05(2), 69.07, 69.08(1), 69.08(2)(c) and 69.09.) In particular, Rule 69.08(1) references Rule 38.06. The latter Rule compels an applicant to file with the clerk a copy of all affidavits to be used at the hearing of the judicial review application. There is nothing in the Rules, however, pertaining to the nature of the evidence that can be adduced on judicial review.

[59] Most judicial precedents, with respect to the use of affidavit evidence on judicial review, deal with the more familiar review of a judicial or quasi-judicial act or decision of an administrative tribunal, as opposed to decisions made in the exercise of the Minister's discretion. In this Province, the general rule has been expressed as follows in *Dionne v. Sawyer* (1990), 106 N.B.R. (2d) 25 at para. 5 (C.A.) :

... The general rule is that on judicial review affidavit evidence is only admissible to show jurisdictional error: see **R. v. West Sussex Quarter Sessions; Ex p. Johnson Trust Ltd.**, [1973] 3 All E.R. 289 (C.A.); **Re Keeprite Workers' Independent Union et al. and Keeprite**

**Products Ltd.** (1980), 29 O.R. (2d) 513 (C.A.); Wade, **Administrative Law**, (4th Ed. 1977), at p. 282, and Reid & David, **Administrative Law and Practice** (2nd Ed. 1978), at p. 349. ...

[60] As we have seen, MSWM challenged the Minister's decisions on several fronts. The grounds of attack have been identified and the reasons for their rejection by the application judge have been recited. There is no question that some portions of the affidavit evidence adduced by MSWM took issue with the merits or correctness of the Minister's view that it was appropriate to adopt the policy for imported waste from another country. For example, one affiant referred the reviewing judge to the fact that several jurisdictions across North America did not require such strong measures, and challenged the Minister's view that the technology, although expensive to install for existing facilities, was available.

[61] When the reviewing judge made decisions on the admissibility of the affidavit evidence, he was deciding a question of law. Therefore, his decisions on such matters stand to be examined by this Court on the basis of their correctness in law. (*AOV Adults Only Video Ltd. v. Manitoba (Labour Board)* (2003), 228 D.L.R. (4<sup>th</sup>) 656 at para.17 (Man. C.A.))

[62] In this case, the Minister's decision to refuse to amend Condition #32 was made on the basis that the amendment, as requested by MSWM, could not be made unless Condition #5, attached to the MSWM's Certificate of Determination, was also amended. As Condition #5 reflected government policy still in effect, the Minister was simply not prepared to amend Condition #32. As mentioned, in that narrow perspective, the Minister's decisions to refuse to amend and her dismissal of MSWM's appeal from that refusal were obviously logical and certainly not patently unreasonable. In fact, the decisions would have been unreasonable had they been otherwise.

[63] However, MSWM was also entitled to challenge the Minister's decisions on the basis that they were patently unreasonable because they were discriminatory or made in bad faith or for improper purposes, arbitrarily or by the consideration of

irrelevant factors or the failure to consider relevant factors. That is so because discretionary decisions made by a statutory delegate for improper purposes or arbitrarily or by reason of other nominate defects may bring a court to “classify a patently unreasonable finding of fact or law as causing a loss of or an excess of jurisdiction”. ((David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 96, n. 17. As pointed out by Professor Mullan at p. 96, Note 17, “[I]n situations where patent unreasonableness is the standard of judicial review, affidavit evidence is available to prove the error, and the applicant is not constrained by the record of the proceeding giving rise to the application.”

- [64] In my view, affidavit evidence in a case of this nature may be allowed to the extent that it is relevant with respect to an alleged nominate defect causing a loss of jurisdiction such as an allegation that a discretionary decision was made for an improper purpose. No one can seriously suggest that if evidence existed that the discretionary decisions of the Minister in this case were only motivated by partisan politics, rather than by the objects of the legislation, that affidavit evidence to prove it could not be brought before the reviewing judge. On this point, I would adopt the views expressed in Donald Brown & John Evans, *Judicial Review of Administrative Action in Canada*, vol. 2, looseleaf (Toronto: Canvasback Publishing, 1998) c.6 at 6:5300:

... Thus, any evidence that relates to excess of jurisdiction is admissible, as is evidence in support of an allegation that there was “no evidence” in support of a material finding of fact made by an administrative tribunal, evidence establishing an insufficient basis for the administrative action taken, or evidence of a breach of duty of fairness. Of course, where the basis for judicial review involves bias or fraud, it will almost always be necessary to have evidence which is not part of the administrative record. As Denning L.J. noted in an early case, “[w]hen *certiorari* is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary.” On the other hand, where the alleged error of law is not jurisdictional in nature and review is limited to only those errors of law which appear on the face of the administrative record, the applicant will be confined to the

record of the tribunal's proceeding, and supplementary affidavit evidence will not be admitted.

[Footnotes omitted]

[65] Notwithstanding the existence of some leeway regarding what an affidavit in support of an application for judicial review may contain, I agree with the Minister's submission to this Court at para. 23 that: "An application for judicial review is not a trial *de novo* of the decision reviewed, nor is it an appeal." In my respectful view, the reviewing judge was correct in refusing to admit some of the assertions made in the affidavits filed by MSWM in reply to the affidavit of Mark Gynn.

[66] The affidavit of Ms. Chiasson-Foulem was struck out in its entirety. In it, the deponent referred to a newspaper article dealing with statements and comments by certain individuals with respect to the volume of waste being imported to New Brunswick. The affidavit was not admitted for any purpose, and rightly so. It did not comply with Rule 39.01(5), in that it was not confined to facts within the knowledge of the deponent, but, most importantly, it was not relevant, and was simply a minute part of MSWM's rather obvious attempt to take issue with the adoption by the Minister of a policy for imported waste from another country with which MSWM did not agree.

[67] Much of Mr. Richard's reply affidavit was not admitted in evidence, and rightly so. Without going into detail, suffice it to say that some of the rejected parts did not comply with Rule 39.01(5), while others were merely argumentative or were simply attempts to express opinions rather than facts or to adduce expert evidence or opinions of others. More importantly again, the affidavit in reply was an attempt to convince the reviewing judge that the Minister was wrong in adopting the policy underlying the impugned decisions, either because the Minister was misinformed as to the availability of the technology or that the adoption of such exacting standards was not necessary to protect society from the harmful effects of contaminants, such as dioxins and furans. In my view, MSWM was not entitled to challenge the correctness or merits of the adoption of the policy with respect to imported waste from another country and MSWM's attempt to do so by way of affidavit was not appropriate. As mentioned, the decision to adopt the

stringent standards for waste imported from another country was for the Minister to make, and no other.

[68] The reviewing judge also rejected much of the opinion evidence of two experts which, in essence, took issue with the merit or wisdom of the Minister's adoption of such stringent standards. In particular, the evidence adduced was that the technology was not readily available to allow existing facilities to comply, or in the alternative, that such high standards should not have been adopted in any event, as lower standards were tolerated elsewhere in North America. Again, that evidence was not admissible for several reasons, but most of all, because MSWM was not entitled to take issue with the merits, correctness or wisdom of the policy on the basis that it was too stringent, or that it was a standard not applied elsewhere. That was a policy-decision which the Minister was entitled to make, and no other.

[69] For those reasons, I would dismiss the appeal with costs in the amount of \$2,500.

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ALEXANDRE DESCHÊNES, J.A.

WE CONCUR:

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ROBERT C. RICE, J.A.

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J.T. ROBERTSON, J.A.

